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No. 08-404

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DARLETTA ROCHELLE JOHNSON,

Petitioner,

v.

TRANSIT MIX CONCRETE & MATERIALS CO. and TRINITY MATERIALS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE ELEVENTH DISTRICT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Trinity Industries, Inc., a publicly held company, is the ultimate parent of Respondents. No other publicly held company owns 10% or more of the stock of either of the Respondents.

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This brief in opposition is being filed jointly by both Respondents, which were defendants below. Respondents will be referred to collectively as "Trinity."

STATEMENT OF THE CASE

This wrongful death and personal injury suit was tried in state court on a theory of liability recognized by section 414 of the RESTATEMENT (SECOND) OF TORTS (1977) and adopted as controlling law in Texas.[1] While the jury found for Petitioner, the court of appeals reversed. Its reversal had nothing to do with the scope or effect of MSHA[2] (Federal Mine Safety and Health Act, 30 U.S.C. §§801 *et seq.*), given that no MSHA-based claim was submitted to the jury. Instead, the court of appeals reversed solely because Petitioner presented at trial no evidence to support a duty under a state law claim.

A. Course of Proceedings and Disposition of the Courts Below.

Petitioner brought suit under the Texas Wrongful Death Act and Survival Statute, seeking damages for the death of her husband, Brad Johnson, Sr. ("Johnson"). Johnson was fatally injured while working as an independent contractor at Trinity's surface mine. RR2:160-61, 176-77; 4:151, 232-33, 245-46, 248-49, 268; 6:99.[3]

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1. *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985).

2. "MSHA" will be used interchangeably to refer to the Act itself and the agency that enforces the Act.

3. "RR" denotes reporter's record. "CR" denotes clerk's record, and "SCR" supplemental clerk's record.

At the trial of this case, the jury answered "yes" to the only two liability questions submitted. In accord with RESTATEMENT section 414, Question 1 asked the duty question – whether Trinity exercised control over the work that caused Johnson's death – and Question 2 conditionally asked whether Trinity breached a duty by acting negligently:

QUESTION NO. 1

Did TRINITY MATERIALS/TRANSIT MIX exercise control of the work activity that caused the death of Brad Johnson, Sr.?

Answer "Yes" or "No."

Answer _____

If you have answered Question No. 1 "Yes", then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 2

Did the negligence, if any, of those named below proximately cause the occurrence in question?

"NEGLIGENCE" as to Brad Johnson, Sr. means failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

"NEGLIGENCE" when used with respect to TRINITY MATERIALS/ TRANSIT MIX means the failure to use ordinary care with regard to the exercise of control, if any, over the work activity of BRAD JOHNSON, SR. that caused his death.

"ORDINARY CARE" means that degree of care that would be used by a person or entity of ordinary prudence under the same or similar circumstances.

"PROXIMATE CAUSE" means that cause, which in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

Answer "Yes" or "No" for each of the following:

a. Trinity Materials/Transit Mix _____

b. Brad Johnson, Sr. _____

You are instructed that, since the Defendants are corporations, their conduct is of their agents, servants, employees, and vice-

> principals, and any negligence of an agent, servant, employee, or vice-principal of Defendants, in the performance of his or her duties, is the negligence of the Defendants.[4]

3SCR:33-34. The remainder of the jury charge consisted of one question on proportionate responsibility (*i.e.*, asking the jury to apportion responsibility as between Trinity and Johnson) and two questions on compensatory damages. 3SCR 35-39.

On appeal, the Texas Court of Appeals held that Trinity owed no duty to Johnson because there was no evidence that Trinity had exercised control over the work activity that had caused Johnson's death. *Transit Mix Concrete & Materials Co. v. Johnson*, 205 S.W.3d 92, 96 (Tex. Ct. App. 2006) (cited as *Johnson*). Therefore, the court of appeals reversed and rendered a take-nothing judgment against Petitioner. *Id.*

Petitioner sought review in the Texas Supreme Court, presenting issues that focused on the court of appeals' holding that the evidence did not support the verdict:

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4. Texas does not follow a general verdict format but instead asks the jury to answer specific questions, as shown by the multi-volume pattern jury charges used in Texas. *See generally* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES.

ISSUES PRESENTED

I. Existence of Duty and Broad Form Submission

The issue of whether a mine owner exercised control over an independent contractor's work activity is a question of fact for the jury. In broad form as required, jury question 1 submitted the exercise of control, and jury question 2 submitted negligence. Abundant evidence shows that Trinity exercised control over Brad Johnson's work. Trinity's failure to follow its own safety regulations and Trinity's failure to exercise control reasonably, resulted in Brad Johnson's death.

- Is there legally sufficient evidence that Trinity exercised control over part of Brad Johnson's work activity on the day of the accident (submitted in Jury Question 1) and failed to exercise that control reasonably (submitted in Jury Question 2)?

- Did the broad form submission of exercise of control and negligence submit the adopted Trinity safety regulations and its failure to follow those regulations in absence of any objection?[5]

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5. As Trinity pointed out in the Texas Supreme Court, this sub-issue was Petitioner's belated attempt to re-write the jury (Cont'd)

II. Failure to Comply With *Pool*

> The guidelines of *Pool v. Ford Motor Co.* require a court of appeals, when it holds that evidence is factually insufficient, to detail that evidence that explains why the evidence is insufficient. This Court in two cases has held that *Pool*'s standard applies equally to legal insufficiency review.
>
> - Did the court of appeals err in failing to detail why the evidence, asserted to support Trinity's exercise of control over the work activity that caused the death, was "no evidence."

Petitioners' Brief on the Merits at xi-xii. On the basis of those issues presented, the Texas Supreme Court denied review.

After review was denied, Petitioner filed a motion for rehearing. In that motion, Petitioner not only continued to argue that the evidence supported the verdict, but also argued for the first time that Trinity owed a non-delegable duty under MSHA and the common-law doctrine of inherently dangerous activity. Petitioners' Motion for Rehearing at 2. Trinity

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(Cont'd)
charge to eliminate the requirement that Petitioner could not meet, namely, a "yes" answer to Question 1 (the duty question), which was a condition to Question 2 (the breach of duty question). *See* Response to Petition for Review at 5-8; Respondents' Brief on the Merits at 10-16.

responded in part that the new issues were waived because they had not been submitted or requested at trial. Response to Motion for Rehearing at 4-6.[6] The Texas Supreme Court denied the motion for rehearing.

B. Statement of Facts.

Trinity owns and operates a surface mine for sand and gravel. RR2:160-61, 176-77; 4:232-33. Trinity hired Johnson as an independent contractor to do mechanic work. RR4:151, 245-46. On the day of the accident, Johnson was assigned to repair the brakes on a dirt hauler known as a Euclid B-30. RR4:248-49, 268; 6:99.

Before starting the brake job, Johnson began to remove the tire and wheel assembly next to the brake drum. RR6:100-04. The assembly, however, would not come off because it was clogged with debris. RR5:11, 19, 28-30; 6:74-75, 106-08. Johnson unsuccessfully attempted to remove the debris by various methods, sometimes with the help of a Trinity employee named Terry Heard. *See* RR5:160; 6:77, 108-12, 116-17, 132-34, 145, 153-54. Ultimately, Johnson decided to try to remove the debris by heating it with a welding torch. RR6:112-14, 144-46, 150. Johnson borrowed Trinity's welding machine from Heard, before Heard had to return to his own job. RR6:116-17, 134-35, 141-42.

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6. For example, Trinity's Response to the Motion for Rehearing stated at page 2 that "this case does not raise either of these alleged exceptions to the "no duty" rule [*i.e.*, an MSHA-based duty or a common-law duty as to inherently dangerous activity]." Trinity added at the same page of its response: "But this Court need not reach that issue because Petitioner waived these exceptions or claims in a number of ways, including not requesting their submission to the jury."

Shortly afterwards, Johnson spoke with two other Trinity employees – Benito Perez and Bob Farmer. RR4:250, 284-85. Both men walked by Johnson's work area minutes before the fatal accident. RR4:251, 279-80, 285.

Johnson asked Perez for help, explaining that the wheel would not come off. RR4:284-85; RR5:6. Perez, a Trinity mechanic, said that Johnson was not doing the job right and should use a steam cleaner to remove the debris. RR4:279-80, 285; 5:6-7, 11, 28-31. Perez said he had to fix a water pump but would be back in a few minutes to help Johnson. RR4:284-85; 5:10-11, 32-33.

When Farmer walked by, Johnson was holding a welding torch in the air. RR4:251, 255, 270. Farmer asked what he was doing, and Johnson replied that he was using heat to try to remove the wheel. Farmer said, "Okay," and left. RR4:250.

After Farmer left but before Perez returned, Johnson called out for help to Heard, who was working nearby. RR6:119. Heard replied that he was too busy and that Johnson would have to "hang on" a couple of minutes. RR6:119-20. Then the tire exploded from the heat of the welding torch, causing Johnson's fatal injuries. RR6:119-23.

The thrust of Petitioner's case at trial was that Trinity never warned Johnson about the danger of heating a pressurized tire. RR2:147-49. That evidence did not, however, match the theory of liability in the court's charge, which required Petitioner to prove that Trinity had exercised control of the work activity that

caused Johnson's death. 3SCR:33-34. Indeed, any such exercise of control was negated by Petitioner's own evidence that:

- Trinity did not tell Johnson or anyone else not to heat a tire;
- Trinity did not warn Johnson about the risk of an explosion from heating a tire;
- Trinity did not require that Johnson be trained not to heat a tire and wheel assembly; and
- Trinity did not adopt MSHA's tire and rim safety program, which would have dealt with the specific work activity that caused Johnson's death.

RR2:191-92, 202, 204, 208-09, 228; 3:14-15, 18; 4:90-93, 137-39, 143, 198-200, 205-07, 238-39, 255-57; 5:53-55, 57, 75-76, 159, 182; 6:70-71, 84-86, 90-93, 95-96, 112, 176, 178, 183, 229; *see also* RR2:198; 4:11-12, 82-84, 95-96, 115-16; 5:120-22; PX 7-13, 19, 20-24 (Trinity safety rules, policies, and safety documents, all containing no reference to heating a tire).

C. Correction of Misstatements in the Petition.

The petition creates the false impression that the lower courts rejected an MSHA-based duty. It does so by failing to disclose the following: (1) the trial court submitted only one theory of liability, which required Petitioner to prove that Trinity exercised control over

the work activity that caused Johnson's death; and (2) Petitioner did not submit or request any jury question or instruction based on MSHA. Given that no MSHA-based theory of liability was submitted at trial, the court of appeals did not address any issue relating to MSHA's scope or effect.

REASONS FOR DENYING THE PETITION

A. The Court Lacks Jurisdiction over the Petition.

1. To be reviewable in this Court, a federal issue must have been properly presented or addressed by the lower courts.

In reviewing state court judgments under 28 U.S.C. § 1257, this Court will not consider a petitioner's federal claim unless it was either properly presented to or addressed by the state court. *See Adams v. Robertson*, 520 U.S. 83, 86-88 (1997); *Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 217-20 (1983); *Safeway Stores v. Oklahoma Grocers Ass'n*, 360 U.S. 334, 342 n.7 (1959) (federal preemption claim could not be considered because it was not made below).[7]

When the highest state court is silent on a federal question, the Court assumes that the issue was not properly presented, and the petitioner bears the burden

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7. Some opinions of this Court have held that section 25 of the Judiciary Act furnishes the Supreme Court with no jurisdiction unless a federal question has been both raised and decided by a state court, while other opinions have treated this requirement as merely a prudential restriction. *See Illinois v. Gates*, 462 U.S. 213, 217-20 (1983).

of defeating this assumption by demonstrating that the state court had "a fair opportunity" to address the federal question. *Adams*, 520 U.S. at 86-87. To satisfy that requirement, the petitioner must establish that the federal claim was raised "at the time and in the manner required by the state law." *Id.* at 87. Thus, a petitioner's failure to comply with a state procedural requirement may serve as an independent and adequate state-law ground for the state court's judgment, barring jurisdiction in this Court. *Id.*

Moreover, when the decision of the state court might have been either on a state ground or on a federal ground, and the state ground is sufficient to sustain the judgment, the Court will not undertake to review the decision. *Williams v. Kaiser*, 323 U.S. 471, 477-78 (1945). The party seeking review must demonstrate that no state ground can account for the decision below. *Durley v. Mayo*, 351 U.S. 277, 281 (1956).

Applying those principles, the Court held that it lacked jurisdiction in *Michigan v. Tyler*, 436 U.S. 499 (1978), and *Osborne v. Ohio*, 495 U.S. 103, 123 (1990). In the former case, the petitioner failed to present a federal standing question in conformance with state procedure. *Michigan v. Tyler*, 436 U.S. at 512 n.7. In *Osborne*, the petitioner failed to request a jury instruction of scienter as required by a state procedural rule that "serves the State's important interest in ensuring that counsel do their part in preventing trial courts from providing juries with erroneous instructions." *Osborne*, 495 U.S. at 123. In both cases, the petitioner's failure to present an issue in conformity with a legitimate state procedure was an independent

state law ground adequate to support the lower court's judgment, thus precluding this Court's jurisdiction.

The jurisdictional defect present in *Michigan v. Tyler* and *Osborne* is also present here. As will be shown in the next section of this brief, the only claim that Petitioner presented in the trial below was a purely state law claim, and the court of appeals merely held that the evidence presented at trial did not support the jury's verdict under that claim. Further, Petitioner presented no federal preemption argument to the state courts, and no such issue was ever decided by the state courts.

2. No federal issue was presented or addressed below because the state court merely held that no evidence supported a state law claim.

In *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985), Texas adopted RESTATEMENT (SECOND) OF TORTS § 414 (1977) (cited as RESTATEMENT) to define the duty owed by a premises owner to an independent contractor. Under RESTATEMENT section 414, a premises owner owes no duty to protect a contractor from injuries caused by the contractor's own work activity unless the owner retained control of that activity and then failed to exercise its control with reasonable care. *Id.; see also Coastal Marine Serv. of Tex., Inc. v. Lawrence*, 988 S.W.2d 223, 226 (Tex. 1999) (per curiam) (holding that control must exist over the injury-producing activity). The Texas Supreme Court later clarified that retained control can be proved in two ways – by contractual terms that expressly retain control over the work, or by the actual exercise of control regardless of any contractual

terms. *See, e.g., Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002).[8]

Following those principles of Texas law, the trial judge in this case submitted two liability questions to the jury, the second of which was conditioned on a "yes" answer to the first question:

> **QUESTION NO. 1**
>
> Did TRINITY MATERIALS/TRANSIT MIX exercise control of the work activity that caused the death of Brad Johnson, Sr.?
>
> * * * *
>
> If you have answered Question No. 1 "Yes", then answer the following question. Otherwise, do not answer the following question.
>
> **QUESTION NO. 2**
>
> Did the negligence, if any, of those named below proximately cause the occurrence in question?
>
> * * * *

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8. As to claims brought later than the one in question here, the Texas Legislature added an element of actual knowledge in certain kinds of cases against premises owners. *See, e.g., Phillips v. Dow Chem. Co.*, 186 S.W.3d 121, 132-33 (Tex. Ct. App. 2005) (discussing chapter 95 of the Texas Civil Practice & Remedies Code).

> **"NEGLIGENCE"** when used with respect to TRINITY MATERIALS/TRANSIT MIX means the failure to use ordinary care with regard to the exercise of control, if any, over the work activity of BRAD JOHNSON, SR. that caused his death.
>
> * * * *

3SCR:33-34. In accord with section 414 of the RESTATEMENT, Question 1 was the fact question on duty.[9] Question 2 – answered only if Question 1 was answered "yes" – was the fact question on breach of duty.

No other theory of liability was submitted or requested by Petitioner. Indeed, Petitioner's only charge objection was to propose slightly different language on control in Question 1, which confirmed Petitioner's intention to submit a claim under section 414 of the RESTATEMENT. 3SCR:43-49, 53-55.[10]

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9. Under Texas law, the jury in a case like this one may determine the factual predicate for duty – that is, whether control existed. *See, e.g., Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 783 (Tex. 2001) (noting submission of jury question on control).

10. Petitioner submitted a question, definition, and objection at the formal charge conference incorporating "retained control." SCR:46-49, 53-55. Petitioner had no basis for doing so because there was no written contract governing Johnson's work, as the court of appeals noted. *Johnson*, 205 S.W.3d at 95. In the absence of a contract, control is to be shown through the exercise of control in accord with the questions submitted by the trial court. *See Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002). Petitioner did not appeal the trial court's refusal to include the concept of retained control in the jury charge.

Consequently, under Texas law, Petitioner waived all other theories of liability. *See, e.g., Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 529 (Tex. 1997) (claim waived, in part, by failing to request a jury question on control).

Also under Texas law, the sufficiency of the evidence must be tested on appeal under the wording of the submitted charge. *See, e.g., Jackson v. Axelrad*, 221 S.W.3d 650, 657 (Tex. 2007); *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000); *Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 920 (Tex. 1993) (failing to assert applicability of federal law). That is exactly what the court of appeals did in this case. It held that Petitioner presented no evidence to support the jury's "yes" answer to Question 1, the duty question that asked if Trinity had exercised control over the work activity that caused Johnson's death. *Johnson*, 205 S.W.3d at 96.

In so holding, the court of appeals never considered MSHA because no MSHA-based issue was submitted or requested at trial. Petitioner did not propose a jury question asking whether Johnson was a "miner" under MSHA. Petitioner did not request an MSHA-based negligence per se theory like the one submitted in the case cited by Petitioner of *Lieberger v. Walter Co.*, 2005 WL 3784970, 74 Pa. D. & C. 4th 270, 290-93 (Pa. Com. Pl. 2005) (denying motion for summary judgment against MSHA-based negligence per se claim). Petitioner did not request an instruction on non-delegable duty under MSHA, as did the plaintiff in another case cited by Petitioner, namely, *Gibby v. Noranda Minerals Corp.*, 905 P.2d 126, 130-31 (Mont. 1995) (upholding propriety of instruction given). Petitioner did not seek, under

RESTATEMENT section 286, a standard of care definition based on MSHA, as discussed in a third case that cited in the Petition for Writ of Certiorari, *Burnett v. Imerys Marble, Inc.*, 116 P.3d 460, 462-65 (Wyo. 2005) (affirming summary judgment in part because plaintiff was not a "miner" under MSHA). Likewise, Petitioner did not request the trial court to incorporate MSHA into a jury submission under RESTATEMENT sections 413 or 424, which are mentioned at page 21 of the Petition for Writ of Certiorari.

Instead, the only theory submitted or requested at trial was based on RESTATEMENT section 414. Based on that submitted theory, the court of appeals reversed because there was no evidence of an element of that theory, that is, no evidence that Trinity had controlled the work activity that caused Johnson's death. *Johnson*, 205 S.W.3d at 96.

After the court of appeals' reversal, Petitioner sought review in the Texas Supreme Court. In that court, Petitioner presented issues aimed at the court of appeals' ruling that the evidence did not support the verdict:

ISSUES PRESENTED

I. Existence of Duty and Broad Form Submission

The issue of whether a mine owner exercised control over an independent contractor's work activity is a question of fact for the jury. In broad form as required, jury

question 1 submitted the exercise of control, and jury question 2 submitted negligence. Abundant evidence shows that Trinity exercised control over Brad Johnson's work. Trinity's failure to follow its own safety regulations and Trinity's failure to exercise control reasonably, resulted in Brad Johnson's death.

- Is there legally sufficient evidence that Trinity exercised control over part of Brad Johnson's work activity on the day of the accident (submitted in Question 1) and failed to exercise that control reasonably (submitted in Jury Question 2)?

- Did the broad form submission of exercise of control and negligence submit the adopted Trinity safety regulations and its failure to follow those regulations in absence of any objection?

II. Failure to Comply With *Pool*

The guidelines of *Pool v. Ford Motor Co.* require a court of appeals, when it holds that evidence is factually insufficient, to detail that evidence that explains why the evidence is insufficient. This Court in two cases has held that *Pool*'s standard applies equally to legal insufficiency review.

- Did the court of appeals err in failing to detail why the evidence, asserted to support Trinity's exercise of control over

> the work activity that caused the death, was "no evidence."

Petitioner's Brief on the Merits at xi.[11]

After considering those issues, the Texas Supreme Court denied review, prompting Petitioner to file a motion for rehearing. In that motion, Petitioner again argued that the evidence was sufficient to support the verdict. In addition, Petitioner belatedly attempted to raise two issues. First, Petitioner argued that Trinity owed a non-delegable duty under MSHA to train independent contractors on how to do their work safely. Second, Petitioner argued that, under *Loyd v. Herrington*, 143 Tex. 135, 138-39, 182 S.W.2d 1003, 1004 (1944), an "employer has a duty to see that work of an inherently dangerous character is performed by his independent contractor with due care for the safety of others." Not argued in the motion for rehearing was any issue of federal preemption. The motion was properly denied.

The denial of rehearing was especially proper with regard to the newly minted issues regarding MSHA and inherently dangerous activity. Under Texas law, a "judgment must be supported by the pleadings, the evidence, ***and the jury's verdict***." *Boatright v. Tex. Am. Title Co.*, 790 S.W.2d 722, 727 (Tex. Ct. App. 1990) (emphasis added) (citing TEX. R. CIV. P. 301). Thus, a "judgment based on an omitted issue may not be

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11. The same issues, with slightly different wording, appeared on page ix of Petitioner's Petition for Review in the Texas Supreme Court.

rendered." *Id.* In addition, the Texas Supreme Court will not consider arguments not presented in both the trial court and the court of appeals. *See* TEX. R. APP. P. 33.1(a); *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 70 (Tex. 2005) ("Because this issue [whether the Federal Arbitration Act is "reverse preempted" by the McCarran-Ferguson Act] has not been reviewed by the courts below, we decline to reach the issue and express no opinion as to the merits of this argument.").

As shown in detail above, Petitioner did not try an MSHA-based claim, but a state law claim under section 414 of the RESTATEMENT. The sufficiency of the evidence to support that state law claim was the sole issue decided by the court of appeals. Petitioner then sought review from the Texas Supreme Court on state law grounds, and Petitioner never presented the issue of federal preemption. Given that Petitioner failed to present a federal issue below, and given that the Texas courts adjudicated this case on adequate state law grounds wholly independent of any federal issue, this Court lacks jurisdiction over the petition. *See Osborne*, 495 U.S. at 123.

B. MSHA Does Not Require States to Create Tort Claims or to Render Judgments on Theories Not Presented to the Trier of Fact.

Since no federal question was properly presented or addressed below, Trinity will not burden this Court with any extensive briefing on Petitioner's preemption issue. The issue lacks merit, however, for the reasons summarized below.

Petitioner's new federal preemption argument fails for four fundamental reasons. First, States are not obligated to create tort causes of action for violations of federal regulations; indeed, they could constitutionally eliminate all tort claims. Second, MSHA has its own enforcement mechanisms; it does not depend on state tort law to enforce its provisions. Third, the application of RESTATEMENT section 414 in a state court does not preclude MSHA from enforcing its regulations. Fourth, MSHA does not suspend state rules of trial and appellate procedure; in particular, it does not require state courts to render judgments on theories not submitted to the trier of fact. The first three reasons support the Supreme Court of Indiana's ruling that MSHA does not create a duty under Indiana tort law in *Vaughn v. Daniels Co.*, 841 N.E.2d 1133, 1143-44 (Ind. 2006). The fourth reason supports the rulings of the Texas courts below.

Invoking *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008), Petitioner argues the general proposition that preemption principles can apply to state tort law. A far different case from this one, *Riegel* invalidated state tort law that threatened to undermine federal regulations by imposing liability for a medical device that met the stringent standards of the Medical Device Act (MDA). *Riegel* noted that the MDA's exclusivity provision "does not prohibit a State from providing a damages remedy for claims premised on a violation of FDA regulations." *Id.* at 1011. *Riegel* did not hold that States must create tort liabilities to match federal regulations.

Finally, preemption fails because the MSHA training regulations that Petitioner relies on in this Court were

not being enforced at the surface mine where Johnson's accident occurred. After the training regulations were adopted in 30 C.F.R. part 48, Congress repeatedly inserted into successive appropriations bills for the Department of Labor "language [that] specifically prohibit[ed] the use of appropriated funds to . . . enforce[e] . . . training requirements, with respect to . . . any sand, gravel, surface stone, surface clay, colloidal phosphate, or surface limestone mine."[12] Congress continued to do so until after the date of Johnson's fatal accident in 1999.[13]

The above issues regarding MSHA's scope and effect did not arise below.[14] The jury was never asked to

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12. *See* Training and Retraining of Miners Engaged in Shell Dredging or Employed at Sand, Gravel, Surface Stone, Surface Clay, Colloidal Phosphate, or Surface Limestone Mines, 64 Fed. Reg. 53085 (September 30, 1999) (to be codified at 30 C.F.R. part 46). In the preemption context, the Court has considered whether "Congress contemplated . . . enforcement." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 254 (2004).

13. *Id.* (noting that the appropriations rider for fiscal year 1999 included an authorization of funds for MSHA to propose and promulgate final training regulations, which ultimately became effective on October 2, 2000 and specifically addressed, *inter alia*, training of miners engaged in surface mining of sand and gravel).

14. In its brief before the court of appeals, Trinity sought a new trial on the ground that the trial's admission of MSHA-related evidence was reversible error because no MSHA-based claim was submitted at trial and the MSHA training regulations were not being enforced at any relevant time. *See* Appellant's Brief at 29-33. This new-trial point was never reached because the court of appeals properly decided that Petitioner failed to present any evidence to support the state law claim. *See Johnson*, 205 S.W.3d at 96.

determine any MSHA-related fact issues. For example, the jury was not asked whether Johnson was a "miner" under MSHA, whether the training regulations applied to Johnson, or whether Trinity violated MSHA on the occasion in question. Such issues were addressed in Trinity's favor at trial by expert witnesses,[15] no doubt leading Petitioner to make the tactical decision to request, not an MSHA-based theory of liability, but only state law claim based on RESTATEMENT section 414. That state law claim was the only theory of liability submitted to the jury and was, thus, the sole focus of the court of appeals' opinion. Consequently, that opinion does not in any way impede or threaten MSHA, and Petitioner is not entitled to invoke federal preemption to advance a theory of liability never submitted or requested at trial.

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15. For example, Trinity presented the following opinion testimony: MSHA hazard training does not deal at all with applying heat to tires or rims, and MSHA task training does not require the operator to instruct a mechanic on usual tasks or about the danger of applying heat on tires and rims (RR7:81, 83-85); MSHA does not require training an employee like Johnson not to apply heat to a tire and rim. (RR7:87-88); MSHA's tire and rim safety program was designed only for people who, unlike Johnson, change tires (RR7:91-92); Trinity did not violate any MSHA regulation (RR7:95); the tire rim and safety awareness program was intended for people who take rubber tires off of a metal rim, and nothing in the program deals with taking the whole wheel assembly off (RR7:124-25); no regulation required Trinity to train Johnson that he should not apply heat to the tire and rim assembly, and Trinity was not required to perform any task training for a contract worker (RR7:126-28).

CONCLUSION

The court of appeals' opinion is an unexceptional and correct holding that Petitioner did not prove the only theory of liability submitted to the jury, a state law claim based on section 414 of the RESTATEMENT. The court of appeals did not address MSHA because no claim based on MSHA was submitted or requested at trial. Nor did Petitioner argue federal preemption to the Texas courts below. Further, Petitioner's newly raised preemption issue lacks merit. MSHA does not require the creation of corresponding state law claims and does not preempt state rules of trial and appellate procedure.

For all of those reasons, the Court should deny the petition for certiorari and grant Respondents all other relief to which they may be entitled.

Respectfully submitted,

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